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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 1–53) [1] is not yet reported. The decision and order of the Board are reported at 192 NLRB 173 (Pet. App., pp. 54–77, 78–106).

[1] Since the opinions below are lengthy and have already been reproduced as an appendix to the petition of *The Emporium Capwell Co.*, in No. 73–696, O.T. 1973, seeking review of the same judgment, "Pet. App." references are to the appendix to that petition.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 23) was entered on June 29, 1973. On September 19, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to discharge employees who, during good faith efforts by the union that is the exclusive bargaining representative of the employees to eliminate alleged racially discriminatory employment practices under the grievance and arbitration procedures of the collective bargaining contract, insisted that the company bargain directly with them to eliminate those practices and, upon the company's refusal to do so, picketed the company and urged customers to boycott it.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Pet. App., 108–110.

STATEMENT

A. The Board's Findings of Fact

The Company operates a retail department store in San Francisco, California (A. 232–233).[2] Through its membership in a multi-employer group, the Retailer's Council, the Company was signatory to a collective

[2] "A." refers to the appendix to the briefs in the court below. A copy has been filed with the clerk.

bargaining agreement with the Department Store Employes Union (the "Union"), which was the exclusive bargaining representative of the employees in the stock and marking areas of its store (A. 233). The applicable bargaining agreement provided:

> Section 21(E), No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex.
>
> * * * * *
>
> Section 5(B), Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement * * * may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and permissive within this agreement. [A. 233; 131–132, 205, 201.][3]

The agreement also provided that, if after considering a submitted issue for one week the Adjustment Board were unable to reach a settlement, either party could insist upon binding arbitration (A. 233; 208). Finally, the agreement contained a clause providing that there "shall be no strike or lockout during the life of this agreement" (Section 36(A), A. 233; 208).

In a series of meetings in early April 1968,[4] a group of Company employees, including Tom Hawkins and James Joseph Hollins, submitted to union representatives a list of grievances alleging that the Company

[3] The Adjustment Board consisted of six members, three from the Company and three from the Union (Section 36(B), A. 208).

[4] All dates are in 1968 unless otherwise indicated.

was discriminating against racial minorities (A. 233; 133–134), including the charge that employee Russell Young had been denied advancement solely because he is black (A. 234; 134–135). Following these meetings, Union Secretary-Treasurer Walter Johnson designated a union committee to investigate the allegations, and later prepared a detailed report outlining the employees' contentions, which stated:

> Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination does exist and that this discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age. [A. 234; 116, 134–135, 193.] [5]

Shortly thereafter, Johnson presented his report to the Retailer's Council, which concluded that the grievances should be taken directly to the Company (A. 34–35). Accordingly, in mid-April, Johnson met with Company labor relations manager Paul Ehrenfried and it was agreed that the Company "would look into" the situation and "see what could be done" (A. 234; 135).

In May, a group of ten employees, including Hawkins and Hollins, again met with Union representative Johnson. They discussed the problem of racial discrimination in general and the Russell

[5] Copies of the report were distributed to several union members, and Hawkins and Hollins (who were not members of the Union) saw it prior to engaging in their concerted protest (A. 41–42, 117, 138).

Young case in particular (A. 234; 134–136); however, since Young was about to begin his summer vacation, it was agreed that further investigation of the matter should await his return (*id.* at 134–136).

On about September 3, Johnson again met with the employees, including Hawkins and Hollins, and with representatives of the State Fair Employment Practices Committee ("FEPC") and the local Economic Opportunity Council ("EOC") (A. 234; 112, 136). At that meeting Johnson stated that the Union had considered the problem and had concluded that the Company had been acting discriminatorily. He added that in accordance with its contract the Union would demand an Adjustment Board proceeding and would insist upon arbitration if necessary. While acknowledging that arbitration was a time-consuming procedure (A. 234; 146), Johnson pointed out that an arbitration award, once achieved, would produce a "long lasting effect" which would benefit not only the employees having an immediate interest in the problem, but "other people involved in it" as well (A. 234; 136–137, 146).

Some of the employees present expressed "frustration" with Johnson's proposal, and suggested that the Union picket the Company's store (A. 145–146). Johnson rejected the idea, and, in an exchange with Hollins, explained that the Union was obligated to seek satisfaction of grievances according to the terms of its contract and thus could not engage in "dramatic" protests such as boycotts (A. 244–245; 145–147). Johnson further stated that, while individual employees "could take whatever action they wanted so long as it was

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legal," it was the Union's advice that they follow an "orderly legal procedure" (A. 145–146). The EOC and FEPC representatives supported Johnson's position (A. 234; 137, 146, 148–149, 153–155).

The next day, Johnson wrote Vincent Brown, general manager of the Retailer's Council, requesting a meeting of the Adjustment Board to resolve the grievances discussed at the previous day's meeting. The letter stated (A. 235; 144, 166):

> We specifically charge the Emporium with violations of Sections 5(B) and 21(E), of the Agreement between the San Francisco Retailers Council and [the Union]. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position.
>
> We are ready to proceed to immediate arbitration if The Emporium is ready.

In response to this letter, a meeting of the Adjustment Board was convened on October 16. At the outset, Union agent Williams attempted to present evidence of the Company's practices by questioning employees regarding their individual grievances. He was interrupted by Hollins, who—acting as spokesman for himself and employees Hawkins, Epps, and Washington—read a prepared statement objecting to the prosecution of grievances on an individual rather than a group basis and stating that the four employees would not "speak as individuals," but would act only "as a group" (A. 235; 43–44, 49, 115, 113). Hollins added that the group "wanted to talk to the President of The Emporium and wouldn't talk to anybody else" (A. 235; 62, 60), that their "main purpose was to talk to the President to try to reach an agreement with

him to straighten out the problems and conditions of The Emporium" (A. 235; 60). Then, after refusing to give any testimony regarding the individual employee complaints, Hollins, Hawkins, Epps, and Washington walked out of the meeting (A. 235; 43–44, 114).

The Adjustment Board met again on October 18, but none of the four attended. The record is unclear as to what transpired at the meeting, but thereafter, through the Union's intervention, Russell Young was promoted to the position of First Assistant Manager, and Fata, another minority employee, was also promoted to a supervisory position (A. 236; 55–56).[6]

After the October 18 meeting, Hollins went to Company President Batchelder and insisted that they "talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store". Batchelder would not speak with Hollins, but suggested that Hollins discuss the situation with Henderson, the Company's personnel director (A. 236; 120–121). Hollins refused (A. 236; 122).

On October 22, Hawkins and Hollins, together with several other employees, called a press conference at the Sun-Reporter Building in San Francisco, which was attended by representatives of the press, radio, and television. The employees stated that the Emporium was engaging in racist conduct by discriminating against racial minorities and that the employees were

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[6] Notwithstanding the results achieved for Young and Fata, the Union's attorney advised the Union that further success with arbitration was unlikely without the testimony of Hawkins, Hollins, and the other employees (A. 138).

planning to picket the store. Hollins also read the contents of a handbill which the group intended to distribute to the public (see below), adding that its objective was "[t]o try to talk to the top management to get better conditions for The Emporium" (A. 236; 17–20, 62–63, 81–82).

On the following Saturday, November 2, employees Hollins, Hawkins, Epps, and Washington picketed the store from 9:30 a.m. to 6 p.m.,[7] distributing the following handbill to people entering or leaving the store:

> BEWARE EMPORIUM SHOPPERS
> BOYCOTT IS ON ! ! !
>
> For years at the Emporium black, brown, yellow, and red people, have worked at the lowest jobs, at the lowest levels. Time and again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.
>
> The Emporium is a 20th Century Colonial Plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.
>
> Whenever the racist pig at the Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout the Emporium.

[7] The picketing was peaceful, was not done during the picketing employees' working hours and did not block entrances to the store (Pet. App., pp. 86–88, 94–95).

> We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute. [A. 236–237, 198.]

While the picketing was in progress, Johnson, the Union representative, told Hollins that he did not want to see Hollins fired and that the only way to resolve the matter was through arbitration. Hollins ignored Johnson's suggestion and again stated that "the only one they wanted to talk to was Mr. Batchelder" (A. 236–237; 139).

On November 7, Hollins and Hawkins were called to labor relations manager Ehrenfried's office, and given the following written warning with respect to the prior press conference and handbilling:

> These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.
>
> There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.
>
> This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement. [A. 237; 26–27, 85–86, 197, 189.]

Nevertheless, on Saturday, November 9, Hollins and Hawkins again picketed The Emporium and distributed leaflets substantially identical to those distributed the previous week (A. 237; 26–27, 85–86, 196). Accordingly, on Monday, November 11, they were

called to Ehrenfried's office and discharged. They were given discharge slips which bore the notation:

> You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968, in front of The Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68. [A. 238; 31, 87–88, 195, 188.]

The Union subsequently filed with the Retailer's Council a protest over the discharge of Hawkins and Hollins, but did not file unfair labor practice charges with the Board (A. 238, 245; 138). Such charges were filed on their behalf by respondent Western Addition Community Organization (Pet. App., p. 11).

B. The Board's Conclusion and Order

The Board (Members Jenkins and Brown dissenting), sustaining its Trial Examiner, found that the picketing employees were making a demand that the Company "bargain with [them] for the entire group of minority employees," notwithstanding that the Union, the employees' "duly designated bargaining representative, was endeavoring in every way available to it under the [collective bargaining] agreement to adjust any and all cases of racial discrimination brought to its attention" (Pet. App., pp. 103–104).[8] The Board concluded that such concerted activity was not protected by Section 7 of the Act, for it "would seri-

[8] While the Board found that Hawkins and Hollins acted in the "good faith belief" that the Company was practicing racial discrimination (Pet. App., p. 97), it did not find that the Company was in fact engaging in racial discrimination or a pattern or practice thereof (Pet. App., p. 55, n. 2).

ously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement" (Pet. App., pp. 104–105).[9] Accordingly, the Board dismissed the complaint, which alleged that the Company violated Section 8(a)(1) of the Act by discharging Hawkins and Hollins for engaging in the picketing and related activities (Pet. App., p. 56).

C. The Court of Appeals Decision

The court of appeals agreed that, "[i]n abandoning the grievance procedures and seeking to bargain on their own, the picketers here rendered essentially ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement" (Pet. App., p. 24). It concluded however, "that this limited interference *alone* [was not] sufficient to remove

[9] The Board in arriving at its decision considered the views of the Equal Employment Opportunity Commission and the National Association for the Advancement of Colored People, which filed *amicus curiae* briefs with the Board (Pet. App., p. 54, n. 1).

these concerted activities here from the protection of the Act" (Pet. App., p. 24). The court determined that concerted activity involving racial discrimination has a unique status in that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, proscribes racially discriminatory employment practices wholly apart from any prohibition in the collective bargaining agreement, and Section 704(a) of that Title, 42 U.S.C. 2000e–3(a) (*infra*, p. 17) "precludes an employer from discharging employees in retaliation for peaceful picketing of the employer's business in protest of allegedly discriminatory racial practices" (Pet. App., p. 20). Accordingly, it was necessary to accommodate Section 9(a) of the National Labor Relations Act (*infra*, p. 13), which confers upon the representative selected by a majority of the employees the exclusive right to bargain for all employees in the unit, with Title VII. In the court's view, a reasonable accommodation required the Board, in cases such as this, to inquire "whether the union was actually remedying the discrimination to the *fullest extent possible by the most expedient and efficacious means*"; where "the union's efforts fall short of this high standard, the minority group's concerted activities cannot lose its section 7 protection" (Pet. App., p. 28, emphasis in original). The court remanded the case to the Board to make that determination (Pet. App., p. 31).[10]

[10] The court also provided that, on remand, "the Board may consider the issue of whether the picketing of these employees, considering the language used, was so disloyal to their employer as to remove them from the protection of section 7," under *National Labor Relations Board* v. *Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464 (Pet. App., p. 29). In view of its disposition of the case, the Board has found it unnecessary to reach that issue.

Judge Wyzanski, who dissented, would have found the concerted activities here protected by Section 7 of the National Labor Relations Act without any further inquiry by the Board. In his view, Section 9(a) of the National Labor Relations Act could not properly be construed as precluding a minority group from dealing directly with the employer on racial complaints (Pet. App., pp. 45–51). Moreover, since the Board refrained from any comment on the "utterances by Hawkins, Hollins, and their associates," the issue of their propriety was not properly before the court (Pet. App., pp. 51–52).

REASONS FOR GRANTING THE WRIT

The holding of the court below—that concerted activity by a minority group which would otherwise be contrary to the principle of majority rule embodied in Section 9(a) of the National Labor Relations Act is protected where it seeks to eradicate alleged racially discriminatory employment conditions—raises an important and substantial question in the administration of the National Labor Relations Act. It also raises a fundamental question concerning the relationship between the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. Review by this Court is thus warranted.

1. Section 9(a) of the National Labor Relations Act provides that the representative selected by a majority of the employees in an appropriate unit shall be the exclusive representative of all employees in that unit for purposes of collective bargaining with respect to wages, hours of employment, or other conditions of employment. The legislative history of Section 9(a)

makes clear that Congress, in order to promote orderly collective bargaining, and thereby to preserve industrial peace, intended to vest in the employees' chosen representative full power to represent all employees, including dissident or splinter groups, and also, as a necessary corrollary, to preclude the employer from bargaining directly with such groups. See S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. 13; H. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. 20–21. See also *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180. Accordingly, this Court early recognized that "it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions." *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 684. See also *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 338–339.

The court below did not disturb the Board's finding that the concerted activities here involved "nothing short of a demand that [the Company] bargain with the picketing employees for the entire group of minority employees" (Pet. App., p. 24, n. 34). The court also stated that, "[i]n abandoning the grievance procedure and seeking to bargain on their own, the picketers here" not only interfered with the collective bargaining process, but "rendered essentially ineffective

the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement" (Pet. App., p. 24).[11] In his dissenting opinion Judge Wyzanski similarly recognized that the minority employees' actions were a clear "instance of an attempt to bargain respecting working conditions * * *" (Pet. App., p. 43). 43).

Thus, unless different principles apply when the minority employees' actions are directed against racially discriminatory employment conditions, the dissident activities here were contrary to the policy of Section 9(a), and thus fell outside the protection of Section 7 of the Act. See *National Labor Relations Board* v. *Sunset Minerals, Inc.*, 211 F. 2d 224 (C.A. 9); *Plasti-Line, Inc.* v. *National Labor Relations Board*, 278 F. 2d 482 (C.A. 6). See also *National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199 (C.A. 4); *National Labor Relations Board* v. *Shop Rite Foods, Inc.*, 430 F. 2d 786 (C.A. 5).

The court below concluded that an exception to the foregoing principles exists for concerted activity

[11] The court, however, found that this interference was "limited," on grounds that the employees utilized the procedures provided for in the contract before resorting to self-help, and that they were working for the same ultimate goal as was the Union—namely, elimination of racial discrimination (Pet. App., pp. 24–26). But, as the Board noted, this cannot neutralize the fact that the employees, nonetheless, were "acting outside the agreement and contrary to the Union's advice and urging" (Pet. App., p. 103). Indeed, they even refused to give testimony which the Union considered vital to its case, and instead walked out of the Adjustment Board meetings (*supra*, p. 7). See also Pet. App., pp. 42–45, dissenting opinion.

involving racial discrimination since Title VII of the Civil Rights Act of 1964 gives the employee an independent statutory right to be free of racially discriminatory employment practices, and Section 704(a) of that Title precludes an employer from discharging employees for engaging in peaceful picketing to protest such practices. The Board submits that this reasoning does not withstand analysis.

While Title VII prohibits an employer from maintaining racially discriminatory employment conditions (Section 703(a), 42 U.S.C. 2000e–2(a)), it also provides a means whereby an employee can obtain redress for a violation of that Title—*i.e.*, he can file a charge with the Equal Employment Opportunity Commission, and, if the Commission is unable to eliminate the discrimination by voluntary means, he can then attempt to do so through a suit in the federal district court (Section 706(e), 42 U.S.C. 2000e–5(e)).[12] There is no indication in Title VII that Congress intended to go further and authorize an employee to enforce the rights conferred by Title VII by means which would be contrary to the policies of the National

[12] The 1972 amendments to the Civil Rights Act also empower the Commission to bring such a suit (Section 706(f)(1), added by P.L. 92–961, 86 Stat. 103).

Harrell Alexander Sr. v. *Gardner-Denver Co.*, No. 72–5847, argued November 5, 1973, presents the question whether an employee—who pursues both his contractual remedies by filing a grievance under the contract grievance and arbitration procedure, and his federal rights by filing a charge under Title VII—is precluded from maintaining a federal court suit where an unfavorable arbitration decision is entered after the Title VII charge was filed.

Labor Relations Act. On the contrary, during the Senate debate on Title VII, Senator Clark, one of the proponents of the legislation, introduced a statement prepared by the Department of Justice which emphasized that "[n]othing in title VII or anywhere else in this bill affects rights and obligations under the NLRA," and Senator Clark himself added that the Title "would not affect the present operation of any part of the NLRA." Legislative History of Titles VII and XI of Civil Rights Act of 1964 (U.S. Equal Employment Opportunity Commission) 3244–3245.

Nor is a different conclusion required by Section 704(a) of Title VII, 42 U.S.C. 2000e–3(a), which makes it unlawful for an employer "to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The basic purpose of this provision is "to protect [the individual] who utilizes the tools provided by Congress to protect his rights." *Pettway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998, 1005 (C.A. 5). The essential "tools provided by Congress" consist of filing a charge with the Equal Employment Opportunity Commission and, if that proves unavailing, bringing a court suit. While the protection of section 704(a) is not limited to the employee who has filed charges, unlike the National Labor Relations Act, Title VII contains no provision expressly protecting picketing and other concerted activity. Although the

court of appeals in *Green* v. *McDonnell Douglas Corp.*, 463 F. 2d 337 (C.A. 8), stated that "lawful protest also commands the same protection" as "filing complaints to the EEOC," it added that "we find no suggestion that [the] protection [of Section 704(a)] extends to activities which run afoul of the law" (*id.* at 341).[13] Accordingly, if the picketing and related activity in the present case were contrary to the policies of, and thus unprotected by, the National Labor Relations Act (such as picketing in support of a demand for direct bargaining with a splinter group), they would not be sanctioned by Section 704(a) of Title VII.[14]

Finally, contrary to the view of the dissenting judge (Pet. App., p. 42), the Board's position does not give the bargaining representative the "power to stand athwart a minority's claim to the right to seek racial non-discriminatory conditions." This Court has fashioned the duty of fair representation, which " 'has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' "

[13] The court then went on to hold that the "stall-in" demonstration there involved was not a protected activity under Section 704(a) (463 F. 2d at 341). Review of that issue was not sought in this Court. *McDonnell Douglass Corp.* v. *Green*, 411 U.S. 792, 797, n. 6. However, the Court stated: "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it" 411 U.S. at 803).

[14] The court below, in holding that the picketing here would not be privileged if the Board were to find that the Union was seeking to eliminate racial discrimination by "the most expedient and efficacious means," tacitly acknowledged that the scope of Section 704(a) may turn upon the scope of the protection afforded by Sections 9(a) and 7 of the National Labor Relations Act (Pet. App., p. 28, emphasis omitted).

National Labor Relations Board v. *Allis-Chalmers Mfg. Co., supra,* 388 U.S. at 181, quoting from *Vaca* v. *Sipes,* 386 U.S. 171, 182. Thus, if a union representative were not acting in good faith to adjust the complaint of a minority employee, the union would not only be subject to a court suit for breach of its duty of fair representation (see *Vaca* v. *Sipes, supra*), but it would also violate Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A). See *Local Union No. 12, United Rubber C., L. & P. Workers* v. *National Labor Relations Board,* 368 F. 2d 12 (C.A. 5), certiorari denied, 389 U.S. 837.[15]

2. The holding of the court below that a proper accommodation between Section 9(a) of the National Labor Relations Act and Title VII of the Civil Rights Act of 1964 requires that the union not only act in good faith to eliminate racial discrimination practiced by the employer,[16] but that it do so "to the fullest extent possible by the most expedient and efficacious means"

[15] This case does not raise, and the Board has not yet had occasion to pass on, the question whether, in circumstances where the union has failed to fulfill its obligations as a bargaining representative, the minority employees could bypass the union and engage in concerted activity of the kind here for the purpose of compelling the employer to deal directly with them respecting their complaints. See Pet. App., p. 55, n. 2. See, also, *National Labor Relations Board* v. *Tanner Motor Livery, Ltd.*, 419 F. 2d 216, 221 (C.A. 9). Cf. *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 256; *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (C.A. 8).

[16] Title VII also prohibits discrimination on grounds of sex, religion, and national origin (Section 703(a), 42 U.S.C. 2000e-2(a)). The rationale of the court's decision would appear to be applicable to claims of such discrimination as well.

(Pet. App., p. 28, emphasis omitted) would, in the Board's view, require it to apply a standard that would be virtually impossible to administer. The Board would have to decide whether union efforts, taken in a good-faith effort to eliminate racial discrimination, constituted the fullest possible endeavors for "actually remedying" the discrimination and whether there were more "expedient and efficacious means" for accomplishing that objective. Under this standard, the Board would be required, *inter alia,* to substitute its judgment for that of the union with respect to the proper methods for handling the grievances under the grievance and arbitration provisions of the collective bargaining agreement.

The decision how to process a grievance—how far to press a particular point, when to concede on a particular issue and what tactics to use in presenting the position—involves extremely sensitive and delicate considerations not susceptible to evaluation under the kind of standard by which the court of appeals has required the Board to test the union's endeavors. Cf. *Vaca v. Sipes,* 386 U.S. 171, 191–195. The standard the court of appeals adopted would substantially curtail the "wide range of reasonableness [which] must be allowed a statutory representative in serving the unit it represents" (*Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338). Inevitably, the very vagueness of this standard would encourage employees to resort to self-help to challenge a large number of union actions in handling, under the grievance and arbitration provisions of collective bargaining agreements, complaints of racial discrimination. This, in turn, would undermine the judgment of Congress, reflected in the National Labor Relations Act that, to the maximum extent possible, disputes relating to terms and conditions of employment should be adjusted by the means agreed to by the parties, rather than through economic pressure.

Unlike the holding of the court below, the Board's position gives effect to the policies of Title VII without at the same time nullifying those of Section 9(a). Thus, the Board's position requires a minority group complaining of a Title VII violation by the employer to refrain—at least so long as the union representative is making a good faith effort to cure the violation (see n. 15, *supra*)—from engaging in concerted activity to force the employer to bypass the representative. If the individual employees are dissatisfied with the steps the representative takes, they may seek a remedy through the administrative and judicial procedures provided in Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel.

JOHN S. IRVING,
Deputy General Counsel.

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ABIGAIL COOLEY,
Assistant General Counsel,
National Labor Relations Board.

NOVEMBER 1973.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

(No. 71-1656, September Term, 1972)

WESTERN ADDITION COMMUNITY ORGANIZATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

THE EMPORIUM CAPWELL COMPANY, *Intervenor.*

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: ROBINSON and MACKINNON, *Circuit Judges,* and WYZANSKI,* *Senior United States District Judge for the District of Massachusetts.*

JUDGMENT

This cause came on to be heard on a petition for review of an order of the National Labor Relations Board and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the decision and order of the National Labor Relations Board ap-

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

pealed from in this cause are hereby reversed and this case is hereby remanded to the Board in accordance with the opinion of this Court filed herein this date.

Per Curiam.

For the Court:

HUGH E. KLINE, *Clerk.*

Date: JUNE 29, 1973.

Opinion for the Court filed by Circuit Judge MACKINNON.

Dissenting opinion filed by Senior District Judge WYZANSKI.

U.S. GOVERNMENT PRINTING OFFICE: 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–696

THE EMPORIUM CAPWELL CO., PETITIONER

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

No. 73–830

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 1–53)[1] is reported at 485 F. 2d 917. The decision and order of the National Labor Relations Board (Pet. App., pp. 54–106) are reported at 192 NLRB 173.

[1] "Pet App." refers to the appendix to the petition in No. 73–696.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973. On September 19, 1973, the Chief Justice extended the time for filing the petition for a writ of certiorari in No. 73-696 to and including October 27, 1973, and the petition was filed on that date. Also on September 19, 1973, the Chief Justice extended the time for filing the petition for a writ of certiorari in No. 73-830 to and including November 26, 1973, and the petition was filed on that date. The petitions were granted on February 19, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, it was an unfair labor practice for an employer to discharge employees for engaging in concerted activities designed to force it to bypass the exclusive bargaining representative and bargain directly with them over alleged racially discriminatory employment practices.

STATUTES INVOLVED

Sections 7, 8 and 9 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519), 29 U.S.C. 157, 158, and 159, provide in pertinent part as follows:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *.
>
> Section 8(b). It shall be an unfair labor practice for a labor organization or its agents * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, * * *.
>
> * * * * *
>
> Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the ex-

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> clusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.
>
> * * * * *

Section 704(a) of the Civil Rights Act of 1964 (78 Stat. 257), 42 U.S.C. 2000e–3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT

1. The Emporium Capwell Co. ("the Company") operates a retail department store ("The Emporium") in San Francisco, California (Pet. App., p. 80). Through its membership in the San Francisco Retailer's Council, a multi-employer group, the Company was party to a collective bargaining agreement with the Department Store Employees Union ("the Union") which covered all employees in the stock and marking areas of The Emporium (*ibid.*).

In early April 1968, a group of employees covered by the agreement, including Tom Hawkins and James Joseph Hollins, met with their Union representative, Walter Johnson, to discuss a list of grievances, among which was their belief that the Company was discriminating against members of racial minorities in its employment practices (Pet. App., p. 81; A. 73).[2] Johnson appointed a Union committee to investigate the charges of racial discrimination and then prepared a lengthy report outlining the employees' contentions (Pet. App., p. 82; A. 111–112). Johnson submitted this report to the Retailer's Council, which concluded that the grievances should be taken to the Company (Pet. App., p. 82; A. 74). Accordingly, in mid-April Johnson met with the Company's labor relations manager, who agreed that the Company "would look into" the complaints and "see what [it] could do" (Pet. App., p. 82; A. 74).

In May the group of employees met again with Johnson in order to discuss a particular case of alleged discrimination against a black employee, Russell

[2] Section 21(E) of the collective bargaining agreement expressly prohibited discrimination "in regard to hire, tenure of employment, or job status by reason of race, color, creed, national origin, age, or sex" (Pet. App., p. 80; A. 101). ("A." refers to the separate appendix filed in this Court.)

Young (Pet. App., pp. 82–83; A. 74). But since Young was at that time about to begin his summer vacation, it was agreed that any further investigation should be postponed (*ibid.*).

Johnson and the employees met again at the end of the summer, this time together with representatives from the California Fair Employment Practices Committee ("FEPC") and the local Equal Economic Opportunity Council ("EEOC"). At that meeting, Johnson stated that after considering the employees' charges the Union had concluded that the Company had been engaged in racially discriminatory employment practices and that the Union would therefore pursue the grievance procedures under the collective bargaining agreement, including arbitration if necessary, in order to remedy the alleged discrimination. (Pet. App., pp. 82–83; A. 58, 74–75.)[3] Some of the employees present expressed dissatisfaction with this proposal and requested the Union to picket The Emporium (A. 81–82). Johnson rejected their request on the grounds that picketing would be contrary to the terms of the collective bargaining agreement and that an orderly processing of grievances would have a broader and more "long lasting effect" (Pet. App., pp. 83, 89–90; A. 75–76, 81–82). The FEPC and

[3] Under the agreement, grievances were first presented to an "Adjustment Board," consisting of six members, three from the Company and three from the Union; grievances not resolved by the Adjustment Board could then be submitted to arbitration. It was also agreed that there would be no strike or lockout during the life of the agreement. See Sections 5(B) and 36 of the agreement, set forth at A. 101–103.

EEOC representatives supported Johnson's position (Pet. App., p. 83; A. 75, 82–83).

On the following day, Johnson formally requested a hearing before the Adjustment Board (see note 3, *supra*) to present the grievances which had been discussed at the meeting (Pet. App., p. 83; A. 119). The hearing was held on October 16. The Union representative began presenting evidence by questioning employees regarding their individual grievances, but he was interrupted by employee Hollins, who—acting as spokesman for a group of fellow employees—read a prepared statement objecting to the prosecution of grievances on an individual rather than a group basis. He stated that he and fellow-employees Hawkins, Epps, and Washington would not "speak as individuals" but would act only "as a group" in opposing discrimination (Pet. App., p. 84; A. 25, 27, 60–61). Hollins added that he and his colleagues "wanted to talk to the President of The Emporium and wouldn't talk to anybody else" (Pet. App., p. 84; A. 36), and that their "main purpose was to talk to the President to try to reach an agreement with him to straighten out the problems and conditions of The Emporium" (Pet. App., p. 84; A. 35). Then, after refusing to give testimony regarding individual grievances, the four employees walked out of the meeting (Pet. App., p. 84; A. 25, 59–60). Notwithstanding their failure to testify, as a result of the processing of grievances Young was promoted to the position of First Assistant Manager and another black employee was also promoted to a supervisory position (Pet. App., p. 85; A. 32).

Shortly after the meeting of the Adjustment Board, Hollins asked the Company president, Batchelder, to discuss the question of racially discriminatory employment practices at The Emporium, but Batchelder referred Hollins to the Company's personnel director, Henderson (Pet. App., p. 86; A. 64–65). Hollins refused, however, to take the matter up with Henderson (Pet. App., p. 86; A. 65).

On October 22, Hollins, Hawkins, and several other employees, acting without Union authorization, held a press conference attended by reporters from local newspapers and radio and television stations. The employees claimed that the Company was engaging in racial discrimination, and they announced that they were going to picket The Emporium and institute a consumer boycott to force "the top management" to bargain with them over working conditions (Pet. App., p. 86; A. 9–11, 37, 47–48). Hollins also announced that the picketers would distribute handbills containing the following statement, which he read to the press (Pet. App., pp. 86–87; A. 107):

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON ! ! !

> For years at The Emporium black, brown, yellow, and red people, have worked at the lowest jobs, at the lowest levels. Time and again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.
>
> The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

> Whenever the racist pig at The Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout The Emporium.
>
> We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute.

* * * * *

On November 2, Hollins, Hawkins, Epps, and Washington, acting without Union authorization, picketed The Emporium throughout the entire business day and distributed copies of the above handbill to shoppers entering and leaving the store (Pet. App., pp. 86–87). The picketing was peaceful and did not block entrances to the store; it was done on a Saturday, outside the picketing employees' own working hours (Pet. App., pp. 87, 94–95). While the picketing was in progress, Johnson once again told Hollins that the only way to resolve the matter was through the grievance and arbitration procedures under the contract, but Hollins reiterated that "the only one they wanted to talk to was Mr. Batchelder" (A. 76).

On November 7, the Company gave Hollins and Hawkins written warnings that if the picketing was repeated they might be discharged (Pet. App., pp. 87–88; A. 14–15, 49–50, 106, 114). Nevertheless, on the following Saturday Hollins and Hawkins again picketed

The Emporium and distributed handbills alleging racist practices and urging a consumer boycott (Pet. App., p. 88; A. 14–15, 49–50, 105). They were discharged on the next workday.[4]

2. Following the discharge of Hollins and Hawkins, the Western Addition Community Organization ("respondent") filed unfair labor practice charges with the National Labor Relations Board under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), which makes it an unfair labor practice for an employer to interfere with an employee's right, under Section 7 of the Act, to engage in concerted action "for the purpose of collective bargaining or other mutual aid or protection."[5] The Board, adopting the Trial Examiner's findings, conclusions, and recommendations (Pet. App., p. 55), dismissed the charges. The Board reasoned that Section 7 does not protect concerted activities which interfere with the Union's right, under Section 9(a), to act as the exclusive representative "of all the employees in [the] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment," and found that Hollins and Hawkins had been attempting to force the Company to

[4] Their discharge slips read:

"You are being discharged today. Distribution of 'Boycott Emporium' literature on Saturday, November 9, 1968, in front of The Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68." [Pet. App., pp. 88–89; A. 17–18, 51.]

[5] The charges were filed by respondent on behalf of the discharged employees. Such charges "may be made by any person." 29 C.F.R. 102.9. See *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 17–18.

bypass the Union and "bargain with [them] for the entire group of minority employees" (Pet. App., p. 104) with respect to conditions of employment. In the Board's view, to extend the protection of Section 7 to these concerted activities would "handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement" (Pet. App., pp. 104–105).[6]

3. The court of appeals reversed, holding that Section 7 protects concerted activities directed against racially discriminatory employment practices where the dissident employees first resort to the exclusive bargaining representative and that representative fails to remedy "the discrimination to the *fullest extent possible by the most expedient and efficacious means*"

[6] Two Board members dissented. Member Jenkins expressed (Pet. App., pp. 56–71) the view that Section 7 entitles minority employees to deal directly with their employer concerning alleged racially discriminatory employment practices, even where such bargaining is in derogation of the authority of the exclusive bargaining representative under Section 9(a). Member Brown disagreed (Pet. App., pp. 71–77) with the Board's fundamental finding that Hollins and Hawkins had been attempting to coerce the Company into bargaining directly with them.

(Pet. App., p. 28; emphasis in original).[7] The court believed that this holding was necessary to accommodate the separate policies of the National Labor Relations Act and the Civil Rights Act of 1964. The court reasoned that, since Title VII of the latter Act bars discrimination by labor organizations, there could be no lawful conflict between the aims of the dissident employees and those of the exclusive bargaining representative; moreover, the court apparently construed Section 704(a) of that Act, 42 U.S.C. 2000e–3(a), as precluding "an employer from discharging employees in retaliation for peaceful picketing of the employer's business in protest of allegedly discriminatory racial practices" (Pet. App., p. 20). Since there had been no finding as to whether the Union had been remedying the alleged discrimination to the fullest extent possible by the most expedient and efficacious means, the court remanded the case to the Board for the making of that factual determination.[8]

Judge Wyzanski, dissenting from the remand order, expressed (Pet. App., pp. 31–53) the view that Section 7 protects concerted activities directed against alleged racially discriminatory employment practices irrespective of the efforts which the exclusive bargaining representative is making to remedy such discrimination.

---

[7] However, the court observed (Pet. App., pp. 29–30) that activities which are "disloyal" under *National Labor Relations Board v. Local Union No. 1229* (*Jefferson Standard*), 346 U.S. 464, would remain outside the protection of Section 7.

[8] The Board on remand was also to consider the issue of disloyalty. See note 7, *supra*.

SUMMARY OF ARGUMENT

The issue in this case is whether Section 7 of the National Labor Relations Act, interpreted in light of Title VII of the Civil Rights Act of 1964, sanctions concerted activities by dissident employees designed to force their employer to bypass their exclusive bargaining representative and bargain directly with them over alleged racially discriminatory employment practices.

It is well established that Section 7 does not protect concerted activities of that nature where the proposed subject for separate bargaining does not relate to racial discrimination, for such bargaining derogates from the authority of the exclusive bargaining agent under Section 9 of the Labor Act. This consideration is equally forceful when the proposed bargaining subject relates to racial discrimination. Otherwise, where the dissident employees and the exclusive bargaining representative disagree as to whether the employer is engaged in discrimination, the employer would be placed in an untenable position between them. And even where the dissidents and the bargaining representative agree on that issue, they may disagree over the appropriate remedies for the alleged discrimination; settlements between the employer and the dissident employees would almost inevitably be at the expense of other employees and thereby cause strife, disagreement, and disruption within the bargaining unit. Furthermore, to permit separate bargaining by dissidents could lead to fragmentation of the bargaining unit, as each racial or other protected group,

and competing factions within each group, insists upon being recognized for the purpose. Such fragmentation would frustrate the Labor Act's objective of industrial peace and result in the very pitting of one group of employees against another that the majoritarian principle of the Act was intended to avoid.

Separate bargaining is not necessary for effective redress of employment discrimination. Aggrieved employees frequently have adequate remedies under a nondiscrimination provision in their collective bargaining agreement, and they are also protected by the exclusive bargaining representative's duty of fair representation. Moreover, Title VII itself provides a comprehensive set of remedies.

Nothing in Title VII requires a special Section 7 standard authorizing separate bargaining by or on behalf of racial minorities; in enacting Title VII, Congress did not intend to affect existing rights and obligations under the Labor Act or to sanction concerted activities that derogate from the bargaining authority of the majority representative. Moreover, a special standard for alleged discrimination cases would entail administrative and judicial second-guessing of a kind that would place all parties in the position of not being able reasonably to determine their rights prospectively. This is especially true of the standard devised by the court below, which would require an *ex post* determination of whether the majority representative "was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means."

In any event, there is no reason for sanctioning the concerted activities in this case. The collective bargaining agreement contained both a nondiscrimination clause and provision for processing grievances through arbitration, and the majority representative was engaged in a good faith effort to process grievances relating to alleged discrimination. The concerted activities interfered with that effort. Moreover, those activities themselves constituted an unfair labor practice under Section 8(b)(7)(A) of the Labor Act, and Title VII was not meant to sanction violations of that Act.

ARGUMENT

IT WAS NOT AN UNFAIR LABOR PRACTICE FOR THE COMPANY TO DISCHARGE HOLLINS AND HAWKINS FOR ENGAGING IN CONCERTED ACTIVITIES DESIGNED TO FORCE IT TO BYPASS THE EXCLUSIVE BARGAINING REPRESENTATIVE AND BARGAIN DIRECTLY WITH THEM OVER ALLEGED RACIALLY DISCRIMINATORY EMPLOYMENT PRACTICES

The complaint filed with the Board alleged that the Company's discharge of Hollins and Hawkins was an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). That provision makes it unlawful "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]." In turn, Section 7 grants employees the right, *inter alia*, "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus the question here is whether the con-

certed activities of the dissident employees were protected by Section 7.

In considering this question, the court of appeals gave great weight to Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–3(a), which makes it "an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice * * *." However, as the court realized, the dissident employees here did more than simply demonstrate in opposition to alleged employment discrimination. They were involved in more than mere protest activity or the presentation of grievances. The Board expressly found that "this was no mere presentation of a grievance, but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees" (Pet. App., pp. 103–104), and this finding was sustained by the court of appeals (Pet. App., p. 24, n. 34). Even the dissenting judge below noted that "[t]here could not be a plainer instance of an attempt to bargain respecting working conditions, as distinguished from an adjustment of grievances" (Pet. App., p. 43).

Because economic coercion directed toward forcing an employer to bargain directly with dissident employees contravenes important federal labor law policies (see pp. 17–26, *infra*), the court properly refused to hold that Section 704(a), standing alone, barred the discharge of the employees in this case.[9] However, the

[9] Thus the court's holding would sustain the discharge of the dissident employees if it is shown that the Union was "remedying the [alleged racial] discrimination to the fullest extent possible by the most expedient and efficacious means" (Pet. App., p. 28; italics deleted), or if their activities were "disloyal" under the *Jefferson Standard test* (see note 7, *supra*).

court concluded that the general policies embodied in Section 704(a) and the other provisions of Title VII of the Civil Rights Act of 1964 require that concerted activities engaged in for the ultimate purpose of vindicating Title VII rights be granted special protection under Section 7 of the National Labor Relations Act. We disagree with that conclusion in the circumstances of this case for, as we shall show, the extension of Section 7 protection to the kind of concerted activities involved here would seriously disrupt the orderly process of collective bargaining under the National Labor Relations Act without significantly advancing the goals of Title VII of the Civil Rights Act of 1964.

A. PROTECTION OF CONCERTED ACTIVITIES DESIGNED TO FORCE AN EMPLOYER TO BARGAIN SEPARATELY WITH DISSIDENT EMPLOYEES WOULD SERIOUSLY DISRUPT THE ORDERLY PROCESS OF COLLECTIVE BARGAINING

1. *The scope of the protection afforded by Section 7 is circumscribed and limited by the authority of the exclusive bargaining representative under Section 9(a).*

Section 9(a) of the Act provides that the "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The legis-

lative history of this provision makes clear that Congress, in order to promote orderly collective bargaining and thereby to preserve industrial peace, intended to vest in the employees' chosen representative full power and responsibility to represent all employees, including dissident or splinter groups, and also, as a necessary corollary, to preclude the employer from bargaining with such groups. See *Legislative History of the National Labor Relations Act, 1935,* pp. 1313 (vol. I), 2313, 2974–2975 (vol. II) (G.P.O., 1949). See generally Weyand, *Majority Rule in Collective Bargaining,* 45 Colum. L. Rev. 556 (1945).

This Court has consistently recognized and given content to Section 9(a)'s principle of majority rule. Shortly after passage of the Act the Court determined that "it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours, and working conditions." *Medo Corp.* v. *National Labor Relations Board,* 321 U.S. 678, 684. See, also, *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332; *Ford Motor Co.* v. *Huffman,* 345 U.S. 330. And in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 180, the Court summarized the majoritarian principle of the Act as follows:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. *The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.* [Emphasis added.]

For these reasons, it has long been recognized that the scope of protection afforded to minority activity by Section 7 is circumscribed and limited by the authority of the exclusive bargaining representative under Section 9(a). *Plasti-Line, Inc.* v. *National Labor Relations Board,* 278 F. 2d 482 (C.A. 6); *National Labor Relations Board* v. *Draper Corp.,* 145 F. 2d 199 (C.A. 4).[10] And, specifically, it has been recognized that Section 7 does not protect concerted activities designed to force an employer to bypass the majority representative and bargain directly with dissident employees over conditions of employment. See *National Labor Relations Board* v. *Tanner Motor Livery, Ltd.,* 419 F. 2d 216 (C.A. 9).

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[10] See, also, *Food Fair Stores, Inc.* v. *National Labor Relations Board,* 491 F. 2d 388 (C.A. 3); *Lee A. Consaul Co.* v. *National Labor Relations Board,* 469 F. 2d 84 (C.A. 9); *National Labor Relations Board* v. *Sunbeam Lighting Co., Inc.,* 318 F. 2d 661 (C.A. 7); *National Labor Relations Board* v. *Sunset Minerals, Inc.,* 211 F. 2d 224 (C.A. 9); *Harnishchfeger Corp.* v. *National Labor Relations Board,* 207 F. 2d 575 (C.A. 7). In *National Labor Relations Board* v. *R. C. Can Co.,* 328 F. 2d 974, 979, the Fifth Circuit held that a minority strike during initial contract negotiations is protected by Section 7 if "it seeks to generate support for and an acceptance of the demands put forth by the union, * * * so long, of course, as the means used do not involve a disagreement with, repudiation

2. Separate bargaining between the employer and dissident employees over alleged racially discriminatory employment practices derogates from the authority of the exclusive bargaining representative.

The court of appeals recognized that Section 7 does not normally protect concerted activities designed to force an employer into separate bargaining with dissident employees. However, the court concluded that the policies embodied in Title VII of the Civil Rights Act of 1964 require a different result when the object of the proposed separate bargaining is the elimination of alleged racially discriminatory employment practices.[11] The court reasoned that, since Title VII requires labor organizations to oppose racial discrimination, there could be no lawful conflict between the aims of the dissident employees and those of the exclusive bargaining representative, and therefore that the actions of the dissidents were unlikely to derogate from the authority of the majority representative.

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or criticism of, a policy or decision previously taken by the union such as, for example, a no strike pledge, a cooling off period, or the like during negotiation." However, that court has subsequently stated that *R. C. Can* is "of doubtful viability." *National Labor Relations Board* v. *Shop Rite Foods, Inc.*, 430 F. 2d 786, 791. Relying on *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, *supra*, the court in *Shop Rite* held that a non-sanctioned walkout during initial contract negotiations was unprotected by Section 7 because "the national labor policy 'extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.'" 430 F. 2d at 789.

[11] The Board had not found that the Company's employment practices were racially discriminatory (Pet. App., p. 55, n. 2), and the court of appeals made no finding on that question.

In so holding, the court of appeals seriously underestimated the potential interference with the collective bargaining process which could result from such separate bargaining. First, the court ignored the possibility that in many cases the majority representative, acting in good faith, may disagree with the dissident employees' allegations of racial discrimination. Such a disagreement would pose a serious dilemma. "Sanctioning minority activity [in such circumstances] would decrease union effectiveness by decreasing union prestige and by preventing the bargaining unit from maintaining a united front in its negotiation with management; there would seem to be no compelling reason to sanction this disruption of the NLRA scheme where there is no discrimination." Recent Cases, 87 Harv. L. Rev. 656, 661 (1974). One way to avoid this problem would be to protect the activities of such dissident employees only where racially discriminatory employment practices are subsequently proved. But this solution would pose numerous difficulties of its own. Neither the employer, the majority representative, nor the dissident employees could determine their respective rights prospectively under such a scheme. In particular, the employer would be placed in the position of running a serious risk of committing an unfair labor practice no matter what he did to resolve the situation: taking reprisals against the dissident employees would violate Section 8(a)(1) if their activities were subsequently held to be protected; but bargaining with the dissidents would violate Section 8(a)(5) if their activities were unpro-

tected. Thus any scheme resting on retrospective determination of rights would tend to encourage inaction by the employer which might in turn lead to strikes or other industrial strife. Moreover, such a scheme would require the Board to make findings of fact concerning the existence of discrimination and to develop standards for determining the scope of Title VII protections, tasks for which it is not ideally suited.

Nor would these problems all be eliminated by according Section 7 protection only in those cases where the majority representative and the dissenting employees agree that the employer's practices are discriminatory. Even if, as in this case, the majority representative and the dissident employees agree that discriminatory practices exist and must be eradicated, the possibilities are legion for conflict between them, and for consequent disruption of the orderly process of collective bargaining:

> * * * [D]isputes over tactics and timing can be as disruptive as disputes over goals. Moreover, Title VII does not specify the remedies that are required or appropriate to redress past wrongs. It is thus legally possible for the union and the dissidents to take different positions on the use of quotas, seniority systems, training programs and other forms of affirmative action. Such conflict over remedies could significantly disrupt collective bargaining when * * * the employer is forced to negotiate with both the minority and the union. [Recent Cases, *supra*, 87 Harv. L. Rev. at 661–662; footnotes omitted.]

The employer would be caught between the conflicting bargaining representatives in a manner Section 9(a) was intended to preclude.

If the majority representative and the dissident employees disagree over the appropriate remedies for discrimination, concessions made by the employer to the dissidents would be especially likely to contain the seeds of further divisiveness. As this Court has recognized, "advantages to individuals may prove as disruptive of industrial peace as disadvantages." *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332, 338. A special concession made or benefit granted to an individual or a dissident group "creates the suspicion of being paid at the long-range expense of the group as a whole." *Id.,* at 338–339.

Indeed, any settlement concerning working conditions which might result from separate bargaining between the employer and the dissident employees would be likely to differ, in specific content, from the particular solutions which the majority representative would advocate. Such a settlement would disturb preexisting arrangements which had been agreed upon by the employer and the majority representative, and in many cases would adversely affect the interests of at least some of the employees not represented by the dissidents. As Judge Wyzanski pointed out in his dissenting opinion below, "[w]hether Hollins and Hawkins had as ultimate goals affirmative quotas for blacks, or some [other] method of achieving * * * a

[desired] racial balance * * *, it is no secret that what was here sought would be in derogation of the union * * * and many of its members" (Pet. App., p. 44). Thus separate bargaining by dissidents, perhaps especially where successful, is likely to cause strife, disagreement, and disruption within the bargaining unit.

3. *Separate bargaining over alleged discrimination would tend to bring about further fragmentation of the bargaining unit.*

To permit dissident groups to bargain separately with their employers over alleged discrimination would work a substantial erosion of the principle of majority rule. For example, if the Company had bargained with Hollins and Hawkins over alleged racially discriminatory employment practices and had reached an agreement with them on changes in working conditions to remedy such discrimination, that would by no means necessarily be the end of the separate bargaining sanctioned by the decision below. Although Hollins and Hawkins, who are black, purported to represent all "black, brown, yellow and red [employees]" (A. 11), there is no evidence that all those employees, or even a majority of the black employees, were willing to accept Hollins and Hawkins as their bargaining representatives on racial matters. And each racial minority might well insist upon its own bargaining representative. But this result—representation along racial lines—would itself violate Section 703(c)(2) of the Civil Rights Act of 1964, which makes it unlawful for a labor organization "to limit, segregate, or classify its membership * * * [on the

basis of] race, color [etc.]." And see *Hughes Tool Co.*, 147 NLRB 1573; *Pioneer Bus Co.*, 140 NLRB 54.

Moreover, fragmentation of the bargaining unit would not logically stop at racial lines; it is possible that conflicting groups would develop within a particular racial minority, and that each would claim to represent that minority and demand that the employer bargain separately with it. "Furthermore, since [the decision below] relies heavily on the federal policy against employment discrimination and since Title VII prohibits discrimination on the basis of sex, religion, and national origin as well as on the basis of race, competing groups protesting nonracial discrimination may also be protected, further undermining the exclusivity principle." Recent Cases, *supra*, 87 Harv. L. Rev. at 662; footnote omitted.

Such fragmentation of the bargaining unit would be unfair to the employer, who would be caught between conflicting demands and forced to determine who is represented by whom. It would also weaken the majority representative's status as an effective bargaining agent, for industrial experience has shown that a labor organization retains significant bargaining leverage only so long as the employer knows that it speaks for all the employees in the bargaining unit that it represents. And it is by no means clear that separate bargaining by conflicting minority factions would provide an effective means of remedying discriminatory practices. What is clear, however, is that such splinter-group bargaining would frustrate the National Labor Relations Act's objective of industrial

peace and lead to the very pitting of one group of employees against another which the majoritarian principle of Section 9(a) was intended to avoid.

B. FEDERAL LAW PROVIDES OTHER REMEDIES FOR EMPLOYMENT DISCRIMINATION

1. *Contractural and statutory remedies for racial discrimination are afforded under federal labor law.*

In cases, such as this, where the collective bargaining agreement expressly bars racial discrimination, an employee may seek relief against alleged racially discriminatory employment practices by invoking the grievance procedures provided by the agreement. This is an orderly and expeditious method of securing consideration of a claim of discrimination; in many cases it will afford prompt and full relief; and it is more consonant with the general scheme of collective bargaining established by the National Labor Relations Act than are the self-help remedies resorted to by the dissident employees here. Cf. *Gateway Coal Co.* v. *United Mine Workers of America,* No. 72–782, decided January 8, 1974. Furthermore, unsuccessful prosecution of a grievance does not jeopardize pursuit of Title VII remedies. *Alexander* v. *Gardner-Denver Co.,* No. 72–5847, decided February 19, 1974.

Should the majority representative refuse, for inadequate reasons, to process a grievance relating to discriminatory practices, it may be in breach of its duty of fair representation, which this Court has fashioned "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor

law." *Vaca* v. *Sipes,* 386 U.S. 171, 182. That duty requires a labor organization to represent fairly the interests of all employees for whom it is the exclusive bargaining representative. See, *e.g., Steele* v. *Louisville & N.R. Co.,* 323 U.S. 192. Breach of that duty would subject the labor organization to either a suit for damages (*Vaca* v. *Sipes, supra*) or an unfair labor practice charge under Section 8(b)(1)(A) of the Act. See, *e.g., Local Union No. 12, United Rubber, C., L. & P. Wkrs.* v. *National Labor Relations Board,* 368 F. 2d 12 (C.A. 5), certiorari denied, 389 U.S. 837. Title VII remedies against the union might also be available.

Finally, an employer may in certain circumstances commit an unfair labor practice by failing to eradicate racially discriminatory employment practices. See *Farmers' Cooperative Compress,* 169 NLRB 290, 295–298, enforced and remanded, 416 F. 2d 1126 (C.A.D.C.), certiorari denied, 396 U.S. 903. See also, *Tipler* v. *E.I. duPont deNemours & Co.,* 443 F. 2d 125, 129 (C.A. 6).

2. *Title VII remedies are available to dissident employees.*

Title VII of the Civil Rights Act of 1964 was enacted by Congress "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander* v. *Gardner-Denver Co., supra,* slip op. at 7. Title VII both creates statutory rights against invidious discrimination and establishes a comprehensive scheme for the vindication of those rights. The dissident employees' proper recourse under Title VII was to bring charges

of unfair employment practices first to their State or local equal employment agency and, if no relief was secured at that level, then to the Equal Employment Opportunity Commission. The Commission is vested with the "authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge." *Ibid.*

Nothing prevented the dissident employees here from directly pursuing these Title VII remedies. And whether or not the Commission agreed with their claims of discrimination, they would be entitled, after opportunity for the Commission to act, to sue for enforcement of their Title VII rights. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792. Moreover, Title VII provides that a court may appoint counsel for plaintiffs alleging discrimination, "authorize the commencement of the action without the payment of fees, costs, or security," and grant attorneys' fees in meritorious cases. 42 U.S.C. 2000e–5(e) and (k). And "courts have been given broad discretion to frame appropriate relief and may award damages or order affirmative action on an individual or class-wide basis." Recent Cases, *supra*, 87 Harv. L. Rev. at 665. See generally Note, *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1218–1222 (1971). Both the employer and the labor organization can be required to give effect to such a remedial order. See *United States* v. *Local 189, United Papermakers & Paperworkers*, 282 F. Supp. 39 (E.D. La.), affirmed, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919.

C. TITLE VII DOES NOT AUTHORIZE SEPARATE BARGAINING BY OR ON BEHALF OF RACIAL OR OTHER DISADVANTAGED MINORITIES, OR PICKETING IN SUPPORT OF SUCH A SEPARATE BARGAINING DEMAND

We have shown above that the extension of special Section 7 protection for concerted activities engaged in to force an employer into a separate bargaining relationship with dissident employees would pervasively disturb the settled federal labor law principle of majority rule and seriously disrupt the scheme established by Congress for the orderly conduct of collective bargaining and that such an extension of Section 7 protection is not necessary to the full effectuation of the rights guaranteed by Title VII. It is also clear that no congressional purpose to modify the collective bargaining rights established under the National Labor Relations Act can be inferred from the enactment of Title VII. During the Senate debate on the Civil Rights Act of 1964, Senator Clark, one of the sponsors of the Act, affirmatively subscribed to the Justice Department position that "[n]othing in Title VII or anywhere else in this bill affects rights and obligations under the NLRA" and explained that Title VII "would not affect the present operation of any part of the NLRA." U.S. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, pp. 3244–3245. For these reasons, we believe that the general

policies embodied in Title VII should not be interpreted to require protection of dissident bargaining activities under Section 7.

The same considerations also persuade us that Section 704(a) in Title VII should not be read as protecting concerted activities that are contrary to the policies of the National Labor Relations Act and traditionally have fallen outside the protection of Section 7 of that Act. The basic purpose of Section 704(a) is "to protect the employee who utilizes the tools provided by Congress to protect his rights." *Pettway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998, 1005 (C.A. 5). As previously explained, the "tools provided by Congress" in Title VII do not include a right of separate collective bargaining by dissidents with their employer. Instead, these tools consist of filing a charge with the Equal Employment Opportunity Commission and, if that proves unavailing, bringing a court suit. While the protection of Section 704(a) is not limited to the employee who has filed charges, Title VII, unlike the National Labor Relations Act, does not contain any provision expressly protecting picketing and other concerted activity. Accordingly, we believe that Section 704(a) was not intended to, and does not, protect picketing and related activity which is conducted for a purpose other than to support Title VII remedies and which is contrary to the policies of, and thus unprotected by, the National Labor Relations Act. Therefore, since the picketing here was conducted for the specific purpose of forcing the employer to bargain separately with dissident employees, in derogation of the bargaining authority of the majority representative, it was not sanctioned by Section 704(a).

Our conclusion that neither the general policies nor the particular provisions of Title VII require that dissident employees be permitted to bypass the majority representative and bargain directly with their employers concerning alleged discriminatory practices draws further support from the inherent difficulties of attempting to devise a fair and workable standard under which separate bargaining could be permitted. It would, as previously explained, work an intolerable interference with the collective bargaining scheme under the Act to grant dissident employees an unrestricted right to coerce their employer into bargaining with them separately.[12] And a special standard such as that adopted by the court below, which would

[12] The dissenting judge below contended that employees belonging to racial minorities do possess such an unrestricted right. He justified the interference with normal bargaining relationships that such a right would entail by observing that "[t]o to leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy" (Pet. App., p. 50). But it is because of such considerations that this Court fashioned the duty of fair representation. See pp. 26–27, *supra*. It should not be irrebuttably presumed that that duty will inevitably be breached. There is no "mockery of democracy" where that duty is fulfilled; and breach of the duty is actionable. *Vaca* v. *Sipes*, *supra*. Furthermore, Section 8(b)(1)(A) of the Act prohibits invidious discrimination by the majority representative. *Local Union No. 12, United Rubber, C., L. & P. Wkrs.* v. *National Labor Relations Board*, *supra*. Thus there is no warrant for assuming that minority employees, to be adequately represented, require an unrestricted right to bargain separately with their employer.

grant that right in some cases but not in others, would require administrative and judicial second-guessing of a kind that would place all parties, and especially the employer, in the untenable position of neither knowing nor having any reasonable means of determining their rights prospectively.

For example, under the decision below, the Board would be required to determine in each case whether the majority bargaining representative "was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means" (Pet. App., p. 28).[13] But it is not reasonably possible to determine what are "the most expedient and efficacious means" for inducing an employer to abandon discriminatory practices. What works well in some circumstances may not in others. The judgments which the labor organization must make—*e.g.*, whether to file individual grievances or negotiate on a broader basis, whether to press for long-range affirmative action programs or for immediate and specific remedies for current inequalities—will in many cases be of a delicate and sensitive nature and require a close understanding of the personalities involved. Cf. *Vaca* v. *Sipes*, *supra*, 386 U.S. at 191–195. Thus a union could in good faith determine that if it could successfully process grievances in a few strong cases of

[13] This test apparently presupposes that both the majority representative and the dissident employees share a good faith, reasonable belief that discrimination exists. We have previously discussed some of the problems that might arise when the majority representative in good faith concludes that there is no discrimination (see pp. 21–22, *supra*).

discrimination, it would then be in a better position to negotiate with the employer on a broader scale; similarly, a union could reasonably decide to delay negotiations until an existing contract expired, on the ground that the chances of reaching agreement to a broad solution would be greater when the union was free to strike to support its demands. The making of such judgments is at the heart of the discretion vested by the Act in the bargaining representative, and the correctness of such judgments, while perhaps an appropriate issue in a union election campaign, is not readily susceptible of administrative or judicial evaluation. Yet the decision below would force the Board to second-guess the union's strategy after the fact, with no standard other than that provided by hindsight.

Not only would the Board thus be thrust into the inappropriate role of making the kind of judgments that the Act leaves to the discretion of the parties in the bargaining process, but the test itself is unworkably vague and would not afford any of the parties adequate prospective guidance. In particular, it would pose a serious dilemma for the employer, who would not be in a position fully to evaluate whether the labor organization had been pursuing a course of action which the Board or a reviewing court might regard as most efficacious under the circumstances; as we pointed out above in a slightly different context (pp. 21–22, *supra*), the employer would be unfairly caught between the opposing policies of Section 8(a)(1) and Section 8(a)(5).

Moreover, if the union is to carry out its obligation fairly to represent all of the employees in the bargaining unit, it must have latitude to select a course of action which will remedy the discrimination without unduly harming the employees who have not been subjected to discrimination. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430–431. The test enunciated by the court of appeals would substantially curtail the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents." *Ford Motor Co.* v. *Huffman, supra,* 345 U.S. at 338.[14]

D. IN ANY EVENT THE CONCERTED ACTIVITIES IN SUPPORT OF THE DEMAND FOR SEPARATE BARGAINING IN THIS CASE SHOULD NOT BE SANCTIONED

1. *Protection of the concerted activities here would frustrate the purposes of both Acts.*

The dissident employees here were seeking to force the Company to bargain over alleged racially discriminatory employment practices. But discrimination had already been the subject of bargaining between the

[14] Some of the considerations outlined above may suggest the possibility that separate bargaining over alleged discrimination should be permitted as a remedy for an adjudicated breach of the labor organization's duty of fair representation. Cf. *National Labor Relations Board* v. *Tanner Motor Livery, Ltd., supra,* 419 F. 2d 216; *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (C.A. 8). Since there has been no such adjudication here—to the contrary, the Board expressly stated that there was no evidence of a breach of the duty of fair representation (Pet. App., p. 55, n. 2)—that issue is not raised in this case. We note, however, that the prior adjudication of a breach of duty would afford a prospective clarification of the respective rights of the parties.

Company and the Union, and as a result the Company had expressly agreed not to discriminate "in regard to hire, tenure of employment, or job status by reason of race, color, creed, national origin, age, or sex" (Pet. App., p. 80; A. 101). Although this broadly phrased promise did not speak to specific instances of discrimination or provide specific remedies, the Company further agreed to a grievance procedure, including binding arbitration, for the enforcement of this and other contractual undertakings. Both the Company and the Union reasonably anticipated that, during the life of the collective bargaining agreement, specific complaints concerning alleged discrimination could be satisfactorily handled through this grievance procedure. Experience in handling specific grievances could, of course, provide a basis for bargaining over more detailed contractual provisions with respect to discrimination when the time came for re-negotiation of the agreement.

The grievance procedure was open to the dissident employees here. Moreover, pursuing that procedure would not have been a mere empty exercise; the Board found that "[a]ll the evidence indicates that the Union * * * was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention, and in at least one and apparently two cases had brought about the desired adjustment" (Pet. App., p. 103). Nevertheless, the dissidents refused to pursue their remedies under the collective bargaining agreement; instead, acting without Union authorization, they engaged in concerted activities to force the Company to

deal directly with them as representatives of all minority employees.

We submit that, at a minimum, when the collective bargaining agreement expressly bars discrimination and the majority representative is making a good faith effort to process grievances relating to alleged discrimination, dissident employees should not be permitted to bypass the grievance procedure and engage in unauthorized concerted activities for the purpose of forcing their employer into a direct bargaining relationship with them. Such activities, as we have shown above, interfere with the scheme established by the Act for orderly collective bargaining and are unnecessary to a full effectuation of Title VII rights.

Indeed, the concerted activities here interfered with, rather than furthered, the Union's good faith efforts to remedy the alleged discrimination. The dissident employees refused to cooperate with the Union and insisted upon negotiating separately with the Company. In doing so, they hampered the Union in its pursuit of contractual grievance procedures on behalf of themselves and other minority employees. The Board found that the Union "was prepared to resort to arbitration to enforce its position that racial discrimination in conditions of employment existed in [The Emporium], and was handicapped in proceeding by the the four employees' refusal to assist * * * the Union * * *" (Pet. App., p. 103).[15] The court

[15] The Union's attorney advised it that in the absence of the dissidents' testimony, which they refused to give, it would be impractical to proceed to arbitration on any of the grievances (A. 76).

of appeals sustained this finding, stating that "[i]n abandoning the grievance procedures and seeking to bargain on their own, the picketers here rendered essentially ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement" (Pet. App., p. 24). The policies embodied in Title VII surely do not require protection of concerted activities, like these, which directly frustrate efforts to remedy employment discrimination.

2. *A holding that the dissident employees' activities here were protected by Section 7 would be inconsistent with Section 8(b)(7)(A) of the National Labor Relations Act.*

Section 8(b)(7)(A) of the Act makes it an unfair labor practice for a "labor organization * * * to picket * * * any employer where an object thereof is forcing or requiring an employer to recognize or bargain with [it] as the representative of his employees * * * where the employer has lawfully recognized * * * [another] labor organization." When Hollins, Hawkins, and the other picketers joined together for the purpose of making a collective demand on the Company with respect to working conditions, they constituted a "labor organization" under Section 2(5) of the Act.[16] This is true even though their internal organization was loose, unstructured, and informal. See, *e.g.*, *National Labor Relations Board* v.

[16] That provision defines "labor organization" as "any organization * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, * * * or conditions of work."

Cabot Carbon Co., 360 U.S. 203; *Utrad Corp.* v. *National Labor Relations Board*, 454 F. 2d 520 (C.A. 7); *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (C.A. 3). The object of the dissident employees was to coerce the Company to bargain with them concerning conditions of employment (see pp. 7–8, 10–11, 16, *supra*),[17] and they chose picketing as one of the economic weapons with which to achieve that end. It is undisputed that the Company had already lawfully recognized another labor organization as the exclusive bargaining representative for its stock and marking employees.[18] Thus the picketing here fell within the literal proscription of Section 8(b)(7)(A).

Moreover, such a violation of Section 8(b)(7)(A) is no mere technical violation, "for one of the objectives of [that provision] is to protect an employer from being 'caught between' two labor organizations, whether or not they are rivals." Recent Cases, *supra*,

[17] It is immaterial that the employees were not seeking formal recognition as a bargaining agent; it was sufficient to constitute a violation of Section 8(b)(7)(A) that they sought to bargain over working conditions. See, *e.g.*, *Dallas Building and Construction Trades Council* v. *National Labor Relations Board*, 396 F. 2d 677 (C.A.D.C.); *Centralia Building and Construction Trades Council* v. *National Labor Relations Board*, 363 F. 2d 699 (C.A.D.C.); *National Packing Company* v. *National Labor Relations Board*, 377 F. 2d 800 (C.A. 10).

[18] Section 8(b)(7)(A) bars picketing only where "a question concerning representation may not appropriately be raised." But the five-year contract between the Union and the Company had been in effect less than 18 months at the time of the picketing here in question, and under the Board's rules the Union's majority status was not subject to challenge during the first three years of that contract. See *Penn-Keystone Realty Corp.*, 191 NLRB 800, 802.

87 Harv. L. Rev. at 663. See *Lane-Coos-Curry-Douglas Counties Bldg. & C.T. Council* v. *National Labor Relations Board*, 415 F. 2d 656, 658–659 (C.A. 9); *Dallas Building and Construction Trades Council* v. *National Labor Relations Board*, 396 F. 2d 677, 680–681 (C.A.D.C.). By seeking to force the Company to bargain separately on two fronts, the discharged employees violated the spirit as well as the letter of Section 8(b)(7)(A).[19]

Section 7 does not protect concerted activities which constitute unfair labor practices under another provision of the Act. See, *e.g.*, *National Packing Company* v. *National Labor Relations Board*, 377 F. 2d 800 (C.A. 10). Cf. *Auto. Workers* v. *Wis. Board*, 336 U.S. 245, 260–263. See, also, Cox, *The Right to Engage in Concerted Activities*, 26 Indiana L. J. 319, 325 (1951). Thus, while the Board in the present case merely determined that the discharged employees' activities were not protected by Section 7 and had no need to decide whether those activities also constituted an unfair labor practice under Section 8(b)(7)(A), the latter provision effectively precludes a contrary interpretation of Section 7. Since the employees' concerted activities here constituted an unfair labor practice under Section 8(b)(7)(A) of the Act, those

[19] Moreover, by insisting that the Company's president, rather than its personnel director, meet with them to discuss working conditions, the dissident employees also violated Section 8(b)(1)(B) of the Act, which makes it unlawful for a labor organization "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

activities *a fortiori* were outside the protection of Section 7.

Nor does anything in Title VII change this result, since its protections do not extend to "deliberate, unlawful activity" (*McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 803), or to "activities which run afoul of the law." *Green* v. *McDonnell Douglas Corp.,* 463 F. 2d 337, 341 (C.A. 8), vacated and remanded, 411 U.S. 792. Since the picketing here "ran afoul" of Section 8(b)(7)(A) of the National Labor Relations Act and unlawfully disrupted the collective bargaining scheme established under that Act, it was not protected by the Civil Rights Act of 1964.[20]

[20] Respondent claims that this Court's reference in *McDonnell Douglas* to "unlawful" acts refers only to "criminal conduct and has no legitimate application to the kind of orderly, peaceful conduct in which Hawkins and Hollins engaged" (Br. in Opp., p. 10, n. 6). But whatever basis there may be for extending the protections of Section 704(a) to noncriminal unlawful activity in other contexts, there is no basis for doing so in the context of this case. The orderly process of collective bargaining and the established goals of federal labor policy can be just as disrupted by noncriminal conduct directed toward impermissible objectives as by criminal conduct directed toward permissible objectives. See *National Labor Relations Board* v. *Drivers, Local Union,* 362 U.S. 274, 290–291; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board,* 341 U.S. 694, 703–704. And see our discussion of Section 704(a), *supra,* pp. 30–31.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
KEITH A. JONES,
Assistant to the Solicitor General.
PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT H. BORK,
Solicitor General,
LAWRENCE G. WALLACE,
Deputy Solicitor General,
KEITH A. JONES,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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1. Respondent's[1] argument in this Court is essentially a plea of confession and avoidance. The question presented by the petitions for writs of certiorari, and accepted by this Court for review, is whether the Company had committed an unfair labor practice by discharging two employees, Hawkins and Hollins, for engaging in concerted

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[1] "Respondent" refers to Western Addition Community Organization.

activities designed to force the Company to bypass the Union, their exclusive bargaining representative, and bargain directly with them over alleged racially discriminatory employment practices. But the basic thrust of respondent's argument here is that that question is not in fact before the Court.

The linchpin of respondent's argument is its factual hypothesis that "the employees' conduct here did not amount to bargaining" (Br. 27) but was merely a "protest * * * intended to publicize * * * their underlying grievance concerning discrimination" (Br. 30). Respondent then proceeds to argue that mere lawful protest activity, not designed to coerce the employer into a separate bargaining relationship with dissident employees, is protected by the proviso to Section 9(a) of the National Labor Relations Act, 29 U.S.C. 159(a), and Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). We do not here question the validity of that conclusion;[2] we do, however, question its relevance to this case.

The Board expressly found, directly contrary to respondent's hypothesis, that "[t]he evidence * * * establishes that this was no mere presentation of a grievance, but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees" (Pet. App. 103-104; see, also, Pet. App. 55).[3] Thus necessarily implicit in respondent's

[2]The Board here takes no position on the question whether Section 9(a) of the National Labor Relations Act protects picketing or other coercive activities engaged in to force an employer to hear a grievance outside the normal grievance procedures established in the collective bargaining agreement. Cf. *Black-Clawson Co., Inc.* v. *International Association of Machinists*, 313 F. 2d 179, 185 (C.A. 2).

[3]Respondent also contradicts other findings of the Board. For example, respondent states flatly that "no picketing occurred in this case" (Br. 35, n. 38), whereas the Board expressly found that the discharged employees had twice picketed the Company's store (Pet. App. 86-89) and the court of appeals accepted that finding (Pet. App. 8-10, 29).

argument is the contention, never expressly stated, that that finding is not supported by substantial evidence.[4]

a. Respondent's contention does not support the judgment of the court of appeals. Under that court's holding, the Company would have been justified in discharging the two employees if the Union had been remedying the alleged employment discrimination "to the *fullest extent possible by the most expedient and efficacious means*" (Pet. App. 28; emphasis in the original). The court accordingly remanded the case to the Board for the making of the necessary factual determination concerning the Union's efforts to remedy discrimination. See Pet. App. 27-28. In contrast, the logic of respondent's contention is that the employees' activities were privileged irrespective of the Union's efforts and therefore does not support such a remand.

In the absence of a cross-appeal or cross-petition, appellees and respondents normally are not entitled to advance arguments that do not support the judgment under review. See *Strunk* v. *United States*, 412 U.S. 434, 437; *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516, 521; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4. We are persuaded, however, that a responding party who is willing to accept the judgment of a lower court should "be under no obligation to file a petition or cross-petition as a protective measure in the event his opponent should seek Supreme Court review." Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 779 (1974). Respondent is willing to accept the judgment below. See

[4]The same contention underlies the argument of two of the three *amici curiae* who support respondent. See pp. 10-16 of the brief of the Department Store Employees Union, Local 1100; pp. 8-9 of the brief of Wayne State University Clinical Law Program in Employment Discrimination.

Resp. Br. 51.[5] Thus we do not believe that respondent's mere failure to cross-petition should bar it from challenging the Board's finding in this Court.

At the same time, however, this "Court's exercise of its discretion not to decide certain issues reasonably extends to non-certworthy points raised by respondents as well as those raised by petitioners." Stern, *supra*, 87 Harv. L. Rev. at 778. That discretion should be exercised here to deny respondent's request that this Court review the Board's factual findings to determine whether they are supported by substantial evidence. Respondent's challenge to the Board's findings was considered and rejected by the court of appeals (Pet. App. 24, n. 34; 42-43) and warrants no further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.[6]

b. In any event, the Board's finding that the discharged employees had been attempting to coerce the Company into entering a separate bargaining relationship is amply supported by the evidence. We recited that evidence in our opening brief (pp. 7-9), and it was summarized by the hearing examiner as follows (Pet. App. 104):

> [The dissenting employees' objective] is shown by Hollins' meeting with [the Company's] president, Batchelder, in which he told the latter that he wanted to "discuss what was happening among minority employees," his later insistence that those picketing would be satisfied with nothing less than a meeting with Batchelder, and Hawkins' testimony that those picketing were seeking to "talk to the top management to get better conditions for The Emporium," that those picketing were seeking to accomplish their objectives through "group talk and through the president if we could talk to him."

[5]Respondent would not in any event be entitled to a modification of the judgment below. If this Court concluded, on the basis of respondent's arguments, that the Board's finding is not supported by substantial evidence, respondent would be entitled only to an affirmance of the judgment below ordering remand to the Board on the question of the Union's efforts. See generally Stern, *supra*, 87 Harv. L. Rev. at 772-777.

[6]Denial of review is especially appropriate where, as here, the respondent's evidentiary contention was not made in its opposition to the petitions for certiorari.

Respondent contends (Br. 32) that this evidence shows only that the dissenting employees were presenting a grievance, not that they were attempting to bargain. That contention overlooks the basic differences between grievances and bargaining. Grievances pertain to "specific maladjustments of a detailed or individual quality" (*Elgin, J. & E.R. Co.* v. *Burley*, 325 U.S. 711, 724) that have arisen under an existing agreement. In contrast, bargaining looks "to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past" (*id.* at 723) and is conducted on behalf of a class of employees.

It is clear that the dissident employees here were not complaining of "specific maladjustments of a detailed or individual quality." They expressly refused to "speak as individuals" (A. 25) or to present testimony regarding individual grievances (A. 25, 35-36, 59-60). They were not even contending that they had been subject to discrimination. Indeed, Hollins had been offered, and had refused, a permanent supervisory position (A. 44, 63). Nor were they attempting to present the particular claims of any other employee.

Instead, the dissident employees were attempting to negotiate with management to effect "some basic change that would benefit the treatment of all minority people" (A. 61). That endeavor bespeaks collective bargaining, not the presentation of grievances. See *National Labor Rela-*

tions Board v. *Tanner Motor Livery, Ltd.*, 419 F. 2d 216, 218 (C.A. 9).[7]

2. The National Urban League and the Southern Christian Leadership Conference (hereinafter collectively referred to as "the League"), in their joint brief as *amici curiae*, argue that, since the parties to a Title VII action may negotiate a settlement out of court, it necessarily follows that, even prior to the filing of a Title VII charge, minority employees have a right to bargain separately with their employer over "matters cognizable in a proceeding under Title VII" (Br. 23). But the League's premise falls far short of establishing that conclusion.

a. The League's argument ignores the structure of Title VII. An individual aggrieved by employment discrimination is not initially entitled to bring suit under Title VII; the procedure established under Title VII requires that the aggrieved individual first file charges of unfair employment practice with the Equal Employment Opportunity Commission. Congress had hoped that the elimination of employment discrimination on account of race would be achieved primarily through conciliation and persuasion, rather than through judicial enforcement, and it therefore vested the Commission with "authority to investigate individual charges of discrimination, [and] to promote vol-

[7]The Union, in its brief as *amicus curiae* (pp. 10-16), suggests that the Company was unaware of the dissident employees' bargaining objective and cites the fact that the Company's warnings contained no explicit reference to such an objective. But the employees, through their statements to Company representatives and to the public (see pp. 7-9 of our opening brief), had fully acquainted the Company with their intentions. The warning notices, moreover, did inform the employees that "[t]here are ample legal remedies to correct any discrimination you may claim to exist" (A. 106), thus indicating the Company's understanding that the employees were not merely attempting to present a grievance under the collective bargaining agreement. The Board properly concluded that "[t]he reference to legal remedies is reasonably construed as meaning that [the employees'] course of action lay outside the terms of the bargaining agreement which [the Company] and the Union were bound to follow" (Pet. App. 105, n. 15). The Company was not required to make any more explicit reference to the employees' unlawful objective.

untary compliance with the requirements of Title VII * * *." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44.. The aggrieved individual ordinarily is empowered to bring suit only if the Commission does not obtain voluntary compliance within 180 days. 42 U.S.C. (1970 ed., Supp. II) 2000e-5(f).

The statutory structure thus evinces a strong preference for orderly, non-adversarial resolution of employment discrimination claims through third-party conciliation. Accordingly, we do not believe that Title VII unqualifiedly protects the kind of coercive self-help measures utilized by the dissident employees here. We recognize, of course, that in many situations such measures are both appropriate and entitled to protection. But we believe that, at least prior to the initiation of suit,[8] such measures are unprotected when they conflict with other important statutory policies or interfere with the exercise of other statutory rights.

b. The League's argument in any event proceeds on the erroneous assumption that the authority of the exclusive bargaining agent is interfered with as much by the negotiated settlement of a Title VII action as by separate bargaining by dissidents prior to the filing of any Title VII charges. Negotiated settlements normally do not interfere with the authority of the exclusive bargaining representative, for the simple reason that in practice the bargaining representative is a party to the Title VII action and joins in the settlement.[9] As a consequence, the terms of

[8]The Board takes no position on the question whether Title VII protects picketing or other coercive measures utilized to induce an employer to settle a pending Title VII action.

[9]Indeed, several courts have held that in some cirmcumstances the bargaining representative is an indispensable party under Rule 19, Fed. R. Civ. P. See *Le Beau* v. *Libby-Owens-Ford Co.*, 484 F. 2d 798 (C.A. 7); *Lynch* v. *Sperry Rand Corp.*, 62 F.R. D. 78 (S.D. N.Y.); *Equal Employment Opportunity Commission* v. *United States Pipe and Foundry Co.*, 375 F. Supp. 237 (N.D. Ala.). But see *Equal Employment Opportunity Commission* v. *Eagle Iron Works*, No. 73-116-1, decided July 2, 1974 (8 FEP

the settlement are effectively integrated into the collective bargaining agreement. The negotiation of a settlement is therefore compatible with the unitary collective bargaining relationship guaranteed by Section 9 of the National Labor Relations Act. The fragmentation of the bargaining unit threatened by separate bargaining (see pp. 20-26 of our opening brief) is for that reason unlikely to occur merely as a result of the process of negotiating the settlement of a Title VII action.

For the foregoing reasons, and also for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

LAWRENCE G. WALLACE,
Deputy Solicitor General.

KEITH A. JONES,
Assistant to the Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

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Cases 344) (S.D. Ia.). Cf. *National Liquorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 363; *United States* v. *Sheet Metal Workers International Association, Local Union No. 36*, 416 F. 2d 123, 132, n. 16 (C.A. 8).